Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

MARSHA FALCHENBERG,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF EDUCATION, THE STATE OF NEW YORK, and NATIONAL EVALUATION SYSTEMS, INC., a/k/a NYSTE PROGRAM,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A New York City public school teacher with dyslexia, a reading disability, applied to take a standardized teacher's certification test required by the State of New York. As an accommodation for her disability, the teacher requested a transcriber or a dictionary as an external spelling aid for the essay portion of the test. In 49 States in the country, spell checkers are standard accommodations for the essay portions of the teacher's certification tests in those States, and a spell checker was an authorized accommodation when New York's standardized certification test was first created and administered.

The State of New York, however, rejected the teacher's requested accommodation on the ground that spelling was measured on the test, that a spell checker was no longer a permitted accommodation, and that any external spelling aids would fundamentally alter the skills measured by the test. New York's teacher certification test requires the test-taker to prepare a written essay where spelling for the final written product is evaluated but the test does not measure the test-taker's ability to orally spell.

The question presented is whether as a matter of law the school teacher can be denied in the State of New York the use of an external spelling aid on the ground that it would fundamentally alter the test.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

Petitioner Marsha Falchenberg;

Respondent New York State and the New York State Department of Education;

Respondent National Evaluation Systems, Inc.; and

Respondent New York City and the New York City Department of Education.

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PETITION FOR WRIT OF CERTIORARI

Marsha Falchenberg respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Second Circuit in the above-entitled case.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit, (Appendix ("App."), *infra*, at 1), is unreported. The Second Circuit's order denying rehearing, (App., *infra*, at 34), is unreported. The opinion of the District Court is reported at 567 F. Supp. 2d 513 (S.D.N.Y. 2008) and reprinted in the accompanying Appendix (App., *infra*, at 9).

JURISDICTION

The Second Circuit entered its judgment on June 8, 2009, and it denied a petition for rehearing on July 16, 2009. (App., *infra*, at 1 & 35.) This petition is filed within 90 days of the denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and an

implementing regulation are set forth at App., *infra*, 36-41.

STATEMENT OF THE CASE

Petitioner was a New York City public school teacher for two years, teaching English, Math, Science and Social Studies primarily to children in the third grade. Although Petitioner has dyslexia, a reading disability, her condition did not interfere with her duties as a teacher; she received satisfactory performance evaluations for her first and second years of employment and a glowing letter of recommendation at the end of her second year.

During Petitioner's second year, Respondent, the New York State Department of Education ("DOE"), required Petitioner, as part of its on-going teacher certification program, to pass a standardized teacher's certification test known as the "Liberal Arts and Sciences Test" or the "LAST." The LAST was created by Respondent National Evaluation Systems, Inc. ("NES") in the early 1990s under a contract with DOE, and since then, the test has been administered by NES.

As an accommodation for her dyslexia, Petitioner requested an oral examination, a transcriber or a dictionary as an external spelling aid for the essay portion of the test. These aids are standard types of accommodations for individuals with dyslexia, and Petitioner used them throughout her education and her tenure as a teacher. The Respondents, however,

refused Petitioner's request for an external spelling aid on the ground that spelling was a factor in the grading of the written essay and that a spell checker was, at the time of the request, a prohibited accommodation for the LAST.

The LAST does not test or measure the test-taker's ability to orally spell. Instead, it requires the test-taker to prepare a *written* essay that is evaluated for many different factors, including the ability to avoid distractions in the written product caused by inattention to the mechanics of writing (such as spelling, punctuation, capitalization, paragraphing). (App., *infra*, at 15.) As such, an external spelling aid does not interfere with an evaluation of the test-taker's ability to prepare a written essay. Nor does it interfere with the evaluation of the test-taker's ability create a properly- spelled essay. But importantly for a dyslexic test-taker, a spelling aid enables one to express himself or herself clearly in writing, so that the *written* product can be evaluated.

Petitioner's request for a spelling aid is not an extraordinary request. A spell checker is a standard accommodation for the essay portion for teacher's certification tests in the other 49 States in the Nation. Only one State, New York, has a blanket rule prohibiting the use of spell checkers or similar external aids for its teacher certification test. In addition, at the time that the LAST was initially designed and for the first two years that it was

administered, a spell checker *was* a permitted accommodation for the LAST. Only later, that specific authorization for the same standardized test was inexplicably changed to prohibit the use of a spell checker.

Petitioner commenced this action in the United States District Court for the Southern District of New York after being terminated from her job as a public school teacher by the New York City Department of Education on the grounds that she had not passed the LAST, as required by New York State regulations. The basis for the District Court's federal jurisdiction was 28 U.S.C. §§ 1331 & 1337 (federal question jurisdiction), and the federal statutory claims in the action were based on 42 U.S.C. § 794a (the Rehabilitation Act) and 42 U.S.C. §§ 12203, 12112, 12131, 12132, 12182, & 12188 (the ADA).

After discovery, the District Court granted Respondents DOE and NES's motion for summary judgment, finding that Petitioner's request for a spelling aid would fundamentally alter the LAST as a matter of law. (App., *infra*, at 24-25.) According to the District Court, "[i]f a skill is measured, it is fundamental to the examination at issue and a requested accommodation that would waive measurement of the skill need not be granted as a matter of law." (App., *infra*, at 24-25.) The Second Circuit affirmed, holding that the requested accommodations "would effectuate precisely the type of fundamental alternation that

need not be made as a matter of law." (App., *infra*, at 5.)*

Petitioner now seeks plenary review by this Court.

REASONS FOR GRANTING THE WRIT

There are three reasons why this Court should grant this petition. First, the decisions by the District Court and the Second Circuit are directly inconsistent with this Court's decision in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001). Indeed, during oral argument before the Second Circuit, that court indicated that it agreed with the *dissenting* opinion in *PGA Tour*, not the majority opinion, on the issue of whether the accommodation request at issue there (a golf cart) would constitute a fundamental alteration of tournament golf. (App., *infra*, at 44-45.) Since the reasoning of the majority opinion must control the analysis, this Court should grant the petition because the lower court's decisions are in direct conflict with a decision of this Court.

Second, as a result of the Second Circuit's decision, the State of New York can and currently does deny as

* After Petitioner was terminated, Respondents DOE and NES offered her a reader and a transcriber for the essay portion of the LAST but also required her to dictate her essay and – at the same time – dictate spelling, punctuation, capitalization and paragaphing. Both parties' experts agreed that this was an impossible task.

an accommodation the use of a spell checker for its teacher certification tests, whereas the other 49 States in the Nation permit the use of a spell checker on their teacher certification tests. The Americans with Disabilities Act ("ADA") was enacted to provide a comprehensive national mandate prohibiting discrimination against individuals with disabilities. Accordingly, this Court should grant the petition and make clear and uniform throughout the country the obligations of entities providing certification and other standardized tests. This Court has not yet had occasion to address the provision of the ADA that specifically governs examinations and courses, 42 U.S.C. § 12189.

Third, the Court should grant this petition because the federal courts have consistently interpreted the ADA narrowly, even though Congress passed the ADA as a broad mandate to effectuate its sweeping purpose – the elimination of discrimination against persons with disabilities. By holding that any alteration of a test procedure is a fundamental alteration as a matter of law, the lower courts' decisions in this case are at odds with the broad and remedial purposes of the ADA. The lower court decisions also expose a re-occurring and unresolved tension between a disable person's desire for an equal opportunity to participate in public accommodations and society's equally valued goal that merit – not status – be the judge of a person's abilities. To address these important issues, the Court should grant the petition.

1. The Lower Courts' Decisions Conflict with This Court's Decision in *PGA Tour, Inc. v. Martin*.

In her arguments to the District Court and to the Second Circuit, Petitioner contended that this Court's decision in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) precluded summary judgment as a matter of law. She also argued that under *PGA Tour*, Respondents were required to carefully weigh the purpose of its ban on spelling aids in determining whether such an accommodation would fundamentally alter the objectives of the test.

Yet neither lower court decision addressed, applied, cited or even distinguished *PGA Tour*, and both simply ruled that since spelling was measured on the test, any spelling aid would operate as a fundamental alteration as a matter of law. Both courts also failed to address the fact that a spell checker had been a permitted accommodation when the test was first created and for two years thereafter. Moreover, neither lower court conducted any analysis of the nature of the skill being tested or the underlying purpose of the rule banning spelling aids. Indeed, as noted above, during oral argument before the Second Circuit, that court stated that there was a "very powerful dissent" in *PGA Tour* on the issue of whether the modification of a golf tournament rule requiring walking would operate as a fundamental alteration of the game of golf. (App., *infra*, at 44-45.) Petitioner respectfully submits that the petition should be granted because the decisions of both lower

courts are inconsistent with the majority opinion in *PGA Tour*.

In *PGA Tour*, a professional golfer had a physical disability that made walking extremely painful. As an accommodation for his disability, the golfer requested that a golf tournament sponsor permit him to use a golf cart and thereby waive a rule that required all contestants to walk during the tournament. According to the tournament sponsor, however, the walking rule was a substantive rule of the contest and that waiving it for any reason would fundamentally alter the nature of the competition. *Id.* at 670. Since walking throughout the 4-day tournament interjected the element of fatigue and tested the contestant's stamina, the tournament sponsor argued that waiver of any potentially outcome-affecting rule would fundamentally alter the contest. *Id.* at 686.

This Court rejected those arguments, holding that the walking rule was peripheral to the contest and that waiving the rule would not as a matter of law fundamentally alter the nature of the contest. "A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to 'fundamentally alter' the tournament." *Id.* at 690. Simply put, rules for the tournament cannot be deemed "sacrosanct." Tournament sponsors, as the providers of public accommodations, do not have "*carte blanche* authority to exempt themselves from the fundamental alteration inquiry by deeming any rule, no matter how peripheral to the competition, to be essential." *Id.* at 689-90 n. 51.

Instead, *PGA Tour* holds that public accommodation providers must "carefully weigh the purpose as well as the letter of a rule before determining that no accommodation would be tolerable." *Id.* at 690.

Here, rather than following the holding in *PGA Tour*, the lower courts embraced superficial arguments about the fundamental alteration inquiry that were expressly rejected by the majority in *PGA Tour*. Thus, the District Court concluded – without analysis – that "[i]f a skill is measured, it is fundamental. . . ." (App., *infra*, at 24.) The Second Circuit agreed, holding that the requested accommodations "would effectuate precisely the type of fundamental alteration that need not be made as a matter of law." (App., *infra*, at 5.)

Petitioner respectfully submits that the blanket ban on any spelling aids in this case is similar to the ban on golf carts in *PGA Tour*. A spelling aid enables a dyslexic to prepare a written essay that can be evaluated on the basis of the final product, which is what the test calls for. Yet by prohibiting the use of a spelling aid, the Respondents were inappropriately focusing on the *means whereby* the essay is created, not the end product, which is the written essay itself.

The dissenting opinion in *PGA Tour* argued the opposite side – that alteration of any of the sponsor's rules governing the contest would be a fundamental alteration, 532 U.S. at 700 (Scalia, J., dissenting) ("But the rules are the rules."); *see also* 532 U.S. at 690 n. 51 (majority opinion) (the dissent "treats the

alteration of any rule governing an event at a public accommodation to be a fundamental alteration."). That is precisely the kind of superficial analysis accepted by the lower courts in this case. That is precisely the analysis expressly rejected by the majority opinion in *PGA Tour*.

The petition should be granted because the decisions by the lower courts directly conflict with this Court's decision in *PGA Tour*.

2. The ADA was Enacted to Establish a Clear and Comprehensive National Mandate.

As noted above, the rest of the country permits a spell checker as an accommodation for the essay portions of their teacher's certification tests and only one state, New York, currently prohibits the use of a spell checker for the essay portion of its teacher certification test. While these facts strongly suggest that New York's opposition to the use a spelling aid is unreasonable, those facts also underscore an additional reason for granting this petition.

Congress passed the ADA for the express purpose of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (findings and purposes); *PGA Tour, Inc.*, 532 U.S. at 675. Yet under the law in the Second Circuit, a teacher is flatly prohibited from using a spell checker when writing an essay for a teacher's certification test in New York State but the same teacher taking a

similar test in any other State can use a spell checker. The conflict should be resolved by this Court.

3. The Federal Courts Have Been Narrowly Reading and Interpreting the ADA.

As noted above, Congress passed the ADA as a broad mandate to eliminate discrimination against disabled individuals. "To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III)." *PGA Tour*, 532 U.S. at 675 (footnotes omitted).

Generally, however, the federal courts have narrowly interpreted the ADA, and the decisions by both lower courts in this case narrowly interpreted the fundamental alteration analysis. Last year, Congress passed the ADA Amendments Act of 2008, Pub. L. 110-325, Sept. 25, 2008, 122 Stat. 3553, to broaden the definition of the term "disability," which the courts were defining more narrowly than Congress intended. *Id.* § 2 (a)(6)-(8). This case presents an opportunity for this Court to express and apply Congress' intent that the ADA be read broadly to achieve its purposes.

CONCLUSION

The petition for writ of certiorari should be granted and the case set for plenary review. In the alternative, the Court should grant the petition, vacate the Second Circuit's judgment, and remand for consideration in the light of *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the city of New York, on the 8th day of June, two thousand and nine.

Present:

HON. JOHN M. WALKER, JR.,
HON. RICHARD C. WESLEY,
HON. J. CLIFFORD WALLACE,*
Circuit Judges.

MARSHA FALCHENBERG,

Plaintiff-Appellant,

-v.- No. 08-3602-cv

NEW YORK STATE DEPARTMENT OF EDUCATION, STATE OF NEW YORK AND NATIONAL EVALUATION SYSTEMS, INC., ALSO KNOWN AS NYSTE PROGRAM,

Defendants-Appellees,

NEW YORK CITY DEPARTMENT OF EDUCATION AND CITY OF NEW YORK,

Defendants.

For Appellant: NATHANIEL B. SMITH (Kristian K. Larsen, Drohan Lee Kelley LLP, *on the brief*), Law Offices of Nathaniel B. Smith, New York, NY.

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* The Honorable J. Clifford Wallace, United States of Appeals for the Ninth Circuit, sitting by designation.

For Appellee National Evaluation Systems, Inc.: PHILLIP S. MCKINNEY, (James P. Rogers, *on the brief*), Rogers & Hardin, LLP, Atlanta, GA.

For Appellee State of New York and New York State Department of Education: CECELIA CHANG, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Benjamin N. Gutman, Deputy Solicitor General, *of counsel*), *for* Andrew M. Cuomo, Attorney General of the State of New York, New York, NY.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment and orders of the United States District Court for the Southern District of New York be **AFFIRMED**.

Plaintiff-appellant Marsha Falchenberg appeals from various discovery orders and the amended opinion filed on July 10, 2008, in the United States District Court for the Southern District of New York (Sweet, J.), (1) granting the motion of the State of New York, the New York State Education Department ("SED"), and National Evaluation Systems, Inc. ("NES") for summary judgment and denying plaintiff's cross-motion for summary judgment; (2) denying

plaintiff's motion to preclude the defendants from introducing evidence; and (3) denying plaintiff discovery on the defenses raised by the defendants in their motion for summary judgment.[1] We assume the parties' familiarity as to the facts, the procedural context, and the specification of appellate issues.

First, Falchenberg argues that the district court erred in holding that NES provided her with reasonable accommodations to take the Liberal Arts and Sciences Test ("LAST") and, thus, did not discriminate against her on the basis of her disability in violation of Titles II and III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12111 *et seq.* the Rehabilitation Act, 29 U.S.C. § 794a, the New York State Human Rights Law ("NYSHRL"), or the New York City Human Rights Law ("NYCHRL"). Disabled individuals are entitled to receive "reasonable accommodations" that permit them to have access to and take a meaningful part in public services and public accommodations. *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir. 2004). However, "a defendant need not make an accommodation at all if the requested accommodation would fundamentally alter

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[1] Falchenberg also appeals from the district court's July 1, 2005 decision dismissing her claims against the New York City Department of Education and the City of New York (collectively, the "City Defendants"). On April 15, 2009, this Court granted the City Defendants' motion to dismiss the appeal, concluding the Falchenberg waived all claims against the City Defendants by voluntarily omitting them as named parties from the Amended Complaint.

the nature of the service, program, or activity." *Id.* at 88 (internal quotation marks omitted); *see also* 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 35.130(b)(7). To be in compliance with the ADA, examinations like the LAST must be selected and administered so as to ensure that, when administered to an individual with a disability, the examination results do not reflect the individual's impaired ability or skill, "except where those skills are the factors that the examination purports to measure." 28 C.F.R. § 36.309(b)(1); *see also* 28 C.F.R. § 36.309(b)(3) (requests for accommodation on examination need not be granted if they would "fundamentally alter the measurement of the skills or knowledge the examination is intended to test."). Thus, where a test applicant seeks an accommodation that would prevent her scores from accurately evaluating the skills intended to be measured by the test, the denial of the requested accommodation is not unlawful. *Powell*, 364 F.3d at 89.

Here, Falchenberg's request for an "oral" examination that does not require her to indicate spelling, punctuation, capitalization and paragraphing would effectuate precisely the type of fundamental alteration that need not be made as a matter of law. It is undisputed that spelling, punctuation, capitalization and paragraphing are among the skills tested on the LAST. Falchenberg's competency at these skills – competencies that all other examinees are required to demonstrate – cannot be tested without requiring her to actually spell, punctuate, capitalize and paragraph. NES granted Falchenberg every accommodation she

requested that did not interfere with the measurement of skills actually tested on the LAST, including an offer to provide her with a reader to read each test question to her, a transcriber to write down her dictated written assignment for her, extra time to take the test, and a separate testing room to avoid distractions from other test takers. However NES was not legally obligated to grant her additional accommodations fundamentally altering the LAST. Thus, the district court was correct to enter summary judgment in the Defendants' favor on Falchenberg's disability discrimination claim.[2]

Second, Falchenberg argues that the district court improperly limited the scope of discovery through various discovery orders entered in November 2006, May 2007, and June 2007. We review discovery orders for an abuse of discretion, and will

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[2] On appeal, Falchenberg also argues that, even if the LAST does test an examinee's spelling, punctuation, capitalization, and paragraphing skills, those skills are unrelated to the skills needed to work as a qualified teacher. As the district court noted, however, Falchenberg failed to challenge the job-relatedness of any aspect of the LAST in her complaint. *See Falchenberg v. N.Y. State Dep't of Educ.*, No 04 Civ. 7598, 2008 WL 2780958, at *7 (S.D.N.Y. July 10, 2008) ("[T]he certification examination is not an issue in this case. There is no allegation that the certification test itself is discriminatory. . . .") (internal quotation marks omitted). Thus, we need not, and do not, consider whether the LAST tests job-related skills. *See Wilkerson v. Meskill*, 501 F.2d 297, 298 (2d Cir. 1974) (concluding that "we cannot hear" arguments that were not "properly raised below").

reverse a district court's discovery rulings only "'when the discovery is so limited as to affect a party's substantial rights.'" *In re "Agent Orange" Prod. Liab. Litig.*, 517 F.3d 76, 102-03 (2d Cir. 2008) (quoting *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 795 (2d Cir. 1985)). Because the discovery orders made by the district court were for the purpose of limiting discovery to the claims actually made by Falchenberg, we conclude that the orders were not an abuse of discretion.

Third, we agree with the district court that, because Falchenberg's disability discrimination claim fails on its merit, her aiding and abetting claims fail as well. *See Falchenberg*, 2008 WL 2780958, at *8. Falchenberg challenges the dismissal of her aiding and abetting claims against SED and NES. However, aiding and abetting is only a viable theory where an underlying violation has taken place. 18 U.S.C. § 2(a); *see also United States v. Reifler*, 446 F.3d 65, 96 (2d Cir. 2006). Because we hold that there was no underlying violation of the ADA, the Rehabilitation Act, or the New York State and New York City Human Rights Laws, we hold that the district court did not err in dismissing Falchenberg's claims for aiding and abetting.

Finally, Falchenberg's claim against NES under the Rehabilitation Act mirrors her claim under the ADA and fails for the same reasons. In any event, because NES is a unit of a business corporation and does not receive any federal financial assistance, it is

beyond the reach of the Rehabilitation Act. *See* 29 U.S.C. § 794(a).

We have reviewed all remaining claims made by Falchenberg and find them to be similarly without merit.

Accordingly, for the reasons set forth above, the judgment and orders of the district court are AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARSHA FALCHENBERG,

Plaintiff,

-against-

NEW YORK STATE DEPARTMENT OF EDUCATION, STATE OF NEW YORK, and NATIONAL EVALUATION SYSTEMS, INC. a/k/a NYSTE PROGRAM,

Defendants.

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04 Civ. 7598

AMENDED OPINION

(Filed Jul. 10, 2008)

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I. INTRODUCTION

Defendant National Evaluation Systems, Inc., a business of NCS Pearson, Inc. ("NES"), the State of New York (the "State") and New York State Education Department ("SED") (s/h/a New York State Department of Education) (State of New York and SED, collectively, "State Defendants") (NES and State Defendants, collectively, "Defendants") have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure against plaintiff Marsha Falchenberg ("Falchenberg" or the "Plaintiff").

Falchenberg has cross-moved under the same rule to dismiss the fifth through twelfth affirmative

defense of NES and the fifth, seventh and eighth defense of the State and SED. Falchenberg has also moved to amend her complaint to add a state official as an individual defendant. For the reasons set forth below, the Defendants' motion is granted and Falchenberg's motions are denied.

In this hard fought and well-litigated action, Falchenberg, disabled by dyslexia, has sought to establish that Defendants have denied her accommodations which might have permitted her to continue as a New York City public school teacher. Sad to say, her efforts, like those of many test takers, have been defeated by the requirement to spell and punctuate.

II. PRIOR PROCEEDINGS

Falchenberg filed a complaint (the "Original Complaint") against the New York City Department of Education ("DOE"), the City of New York (the "City"), and Defendants on September 24, 2004, alleging that all the named entities discriminated against her in violation of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* ("ADA"), the Rehabilitation Act, 29 U.S.C. 794 ("Rehab Act"), the New York State Human Rights Law, New York Executive Law § 296 ("SHRL"), and the New York City Human Rights Law, New York Administrative Code § 8-107 ("CHRL"), or were liable for aiding and abetting a violation of the aforementioned statutes.

The DOE and the City (collectively, the "City Defendants") moved to dismiss the Original

Complaint against them, and by opinion of July 1, 2005, *Falchenberg v. New York City Dep't of Educ.*, 375 F. Supp. 2d 344 (S.D.N.Y. 2005) (the "July 1 Opinion"), the motion was granted and all claims against the City Defendants were dismissed.

In her amended complaint (the "Amended Complaint"), filed on July 26, 2005, Falchenberg reasserted against the remaining Defendants all but one of the claims brought in the Original Complaint. The single claim that was not included in the Amended Complaint was an employment discrimination claim pursuant to Title I of the ADA.

Discovery has been completed. The cross-motions for summary judgment were heard and marked fully submitted on December 5, 2007, and the motion to amend on January 16, 2008.

III. FACTS

The facts are set forth in the parties' Rule 56.1 Statements, the Defendants' Counterstatement, attached affidavits and memoranda of law, and are not in dispute except as noted below.

Falchenberg was born and raised in New York City and had undiagnosed reading problems in elementary school and high school.

In 1986, 12 years after graduating from high school, Falchenberg started attending college classes at the University of Oslo in Norway. In 1992, she was diagnosed as dyslexic. In 1998, after taking college

courses for over 10 years, Falchenberg graduated from the University of Oslo with a B.A. in English and History. After graduating, she continued her studies with post-graduate courses for one year in Education.

In 2000 Falchenberg returned to the United States. For the academic year of September 2001 to June 2002, she taught science to all grades at P.S. 106, a public school in Brooklyn. For the academic year of September 2002 to June 2003, she was the regular classroom teacher for a third grade class at P.S. 384, another Brooklyn Public School, providing instruction in English, Math, Science, and Social Studies. For both positions Falchenberg received satisfactory performance reviews.

SED is a statutory agency of the State of New York created pursuant to New York Education Law § 101 charged with the general management and supervision of all public schools and all of the educational work in the State of New York, including "the examination and certification of teachers employed in all public schools of the state." N.Y. Educ. Law § 3004(1).

NES develops and administers customized teacher certification testing programs under contracts with a number of state education agencies and departments, including SED. NES receives no federal financial assistance and is not a public entity.

Under a contract with SED, NES developed, administers and scores the New York State Teacher

Certification Examinations ("NYSTCE"), which include approximately 58 different tests. The Liberal Arts and Sciences Test ("LAST") is one of those tests. Candidates for public school teacher certification in the State of New York are required by New York law to pass the LAST (among other examinations and certification requirements) in order to become certified teachers. The explicit purpose of the NYSTCE tests (including the LAST) is to help identify for certification those candidates who have demonstrated the appropriate level of knowledge and skills that New York educators have determined to be important for performing the responsibilities of a teacher in New York State public schools.

The LAST is a multi-faceted examination designed to test primarily in five areas of knowledge and skills: (1) scientific, mathematical, and technological processes; (2) historical and social scientific awareness; (3) artistic expression and the humanities; (4) communication and research skills; and (5) written analysis and expression. Each test form for the LAST contains approximately 80 multiple-choice test questions and one constructed response (written) assignment.

The fifth part of the LAST, entitled "Written Analysis and Expression," requires the examinee to "prepare an organized, developed composition in edited American English in response to instructions regarding audience, purpose, and content." Affidavit of Melissa C. Rodriguez ("Rodriguez Aff."), Ex. 6 at 15. The written assignment is expected to be about

300-600 words in length, and represents approximately 20% of the test score on LAST.

The examinee's response to the written assignment is evaluated on the basis of several criteria, among them the following:

> STRUCTURE AND CONVENTIONS: Express oneself clearly and without distractions caused by inattention to sentence and paragraph structure, choice and use of words, and mechanics (i.e., spelling, punctuation, capitalization).

Rodriguez Aff., Ex. 6 at 58.

The examinee's response is required to conform to the conventions of edited American English. It is required to be the examinee's original work, written in his or her own words, and not copied or paraphrased from some other work. The examinee is directed to write about the assigned topic, and to use multiple paragraphs.

The LAST written assignment is evaluated and scored on a 4-point scale, with 4 being the highest score and 1 being the lowest. Each of the four possible scores is based on consideration of a number of factors, including spelling, punctuation, capitalization, and paragraphing. For example, a "4" response is described in the LAST scoring scale in pertinent part as follows:

> The response is free of distracting flaws in sentence structure (e.g., subject-verb

> disagreements, run-on sentences) and paragraph structure (e.g., lack of paragraph breaks to coincide with thought transitions), shows proficient use and choice of words, and avoids disruptive mechanical errors (e.g., inappropriate capitalization, misspellings of common words).

Rodriguez Aff., Ex. 6 at 69.

Proper construction of paragraphs and sentences, proper use of grammar and punctuation, spelling, capitalization and reading comprehension are set forth as scoring criteria in the LAST Preparation Guide and Registration Bulletins as well as other publicly available documents on SED's and NES's respective websites.

On May 6, 2002, Falchenberg registered with NES to take the LAST which was scheduled to be given on July 20, 2002. She submitted an "alternative arrangement request" form to NES, identifying herself as dyslexic and asking for a "dictionary, extra time, frequent breaks, [and an] oral exam." Five weeks later, NES denied Falchenberg's requests.

NES told Falchenberg that a July 8, 1998 report and evaluation of her dyslexia by the Learning Disabilities Unit of the State University of New York's College of Optometry (the "SUNY Report") was too old. According to Falchenberg, the SUNY Report was timely.

In October and December 2002, Falchenberg underwent a complete neuropsychological evaluation

at the Derner Institute of Advanced Psychological Studies at Adelphi University in New York. The following month, on January 31, 2003, the Derner Institute issued its report (the "Derner Report") confirming the SUNY Report's diagnosis of dyslexia with a reading disability, and recommending oral administration of tests. On March 8, 2003, Falchenberg submitted the Derner Report to NES for the next administration of the LAST, scheduled for May 10, 2003. Falchenberg renewed her prior request, seeking additional accommodations including added time and frequent breaks, and submitted a follow-up letter by the doctor who prepared the Derner Report.

NES rejected Falchenberg's request for accommodation, stating that a dictionary would "fundamentally alter the measurement of the skills the examination is intended to test." Declaration of Nathaniel B. Smith in Support of Plaintiff's Cross-Motion for Summary Judgment, Ex. 3. A "reader" (not an oral examination) was also rejected because the "[d]ocumentation submitted does not support the requested accommodation." *Id.*

The NES outside consultant, Dr. Tom E.C. Smith ("Dr. Smith") testified that the SUNY Report supported Falchenberg's request for a reader and that if he had seen the SUNY Report at the time his recommendation to deny the reader would not have been the same.

Falchenberg did not take the May 10, 2003 administration of the LAST. Falchenberg registered for the next administration date, July 19, 2003, and appealed the denial of her accommodation requests. According to Falchenberg, the personnel of NES and SED who denied her appeal were unqualified. Upon a request for reconsideration, NES granted Falchenberg a reader and extra time but again denied her request for an oral examination.

On August 16, 2003, Falchenberg again registered for the next administration of the LAST on October 18, 2003 and specifically requested a reader, a scribe, extra time and an oral examination.

Falchenberg also sought a temporary exemption or waiver from SED, NES or Falchenberg's employer, the DOE,[1] from the requirement that Falchenberg pass the LAST in order to keep her job. Those efforts failed, and on September 2, 2003, the DOE terminated Falchenberg because she had not passed the LAST.

On September 2, 2003, the transcriber request was approved. On September 16, 2003, NES notified

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[1] This Court's original opinion of June 19, 2008, incorrectly stated that Falchenberg was employed by SED. The record is clear, and both parties agree, that Falchenberg's employee was the New York City Department of Education. See Letter from Antoinette W. Blanchette, Assistant Attorney General, State of New York, to Court (June 27, 2008).

Falchenberg that she would be provided with the following accommodations:

(1) a test administrator would read each question to her;

(2) a test administrator would transcribe her responses to the written portion of the LAST, but Plaintiff would be responsible for indicating spelling, punctuation, capitalization, and paragraphing;

(3) Plaintiff would be allowed to bring a lunch and take breaks as needed;

(4) Plaintiff would be provided with a separate room; and

(5) Plaintiff would be allowed a full testing day to complete the test (a total of 9 hours, rather than the standard 4 hour session).

Rodriguez Aff., Ex. 7.

Falchenberg did not appear for, and did not take, the LAST on October 18, 2003, nor has she sought to take the test since that date. She contends that the Defendants' accommodations, which require that she "dictate spelling and grammar," do not amount to a reasonable accommodation of her disability.

IV. SUMMARY JUDGMENT STANDARD

Summary judgment is granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.

56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *SCS Commc'ns, Inc. v. Herrick Co.*, 360 F.3d 329, 338 (2d Cir. 2004). The courts do not try issues of fact on a motion for summary judgment, but, rather, determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

"The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish [its] right to judgment as a matter of law." *Rodriguez v. City of New York*, 72 F.3d 1051, 1060-61 (2d Cir. 1995). Summary judgment is appropriate where the moving party has shown that "little or no evidence may be found in support of the nonmoving party's case. When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." *Gallo v. Prudential Resid. Servs., L.P.*, 22 F.3d 1219, 1223-24 (2d Cir. 1994) (citations omitted).

In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Gibbs-Alfano v. Burton*, 281 F.3d 12, 18 (2d Cir. 2002).

However, "the non-moving party may not rely simply on conclusory allegations or speculation to avoid summary judgment, but instead must offer evidence to show that its version of the events is not wholly fanciful." *Morris v. Lindau,* 196 F.3d 102, 109 (2d Cir. 1999) (quotation omitted).

V. DISCUSSION

A. Discrimination on Basis of Disability Has Not Been Established

The standards adopted by Titles II and III of the ADA and the Rehabilitation Act are, in most cases, the same, and the courts routinely consider the merits of such claims together. *See Powell v. Nat'l Bd. Of Med. Exam'rs,* 364 F.3d 79, 85 (2d Cir. 2004); *Henrietta D. v. Bloomberg,* 331 F.3d 261, 273 (2d Cir. 2003). In order to establish a prima facie case under the Acts, Falchenberg must show: (1) she is an individual with a disability within the meaning of the statute; (2) Defendants had notice of her disability; (3) she was otherwise qualified to meet the program requirements; and (4) Defendants refused to make reasonable accommodations. *Hartnett v. Fielding Graduate Inst.,* 400 F. Supp. 2d 570, 576 (S.D.N.Y. 2005) *aff'd in part and rev'd in part,* 198 Fed. Appx. 89 (2d Cir. 2006). The only element at issue on this motion is whether Defendants refused to make reasonable accommodations for Falchenberg's disability.

Disabled individuals are entitled to "reasonable accommodations" that permit them to have access to and take a meaningful part in public services and public accommodations, *Powell,* 364 F.3d at 85, but "a defendant need not make an accommodation at all if the requested accommodation 'would fundamentally alter the nature of the service, program, or activity.'" *Id.* at 88 (quoting 28 C.F.R. § 35.130(b)(7)). Specifically as to testing, 28 C.F.R. § 36.309(b)(1)(i) requires that examinations be

> selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure). . . .

Where an examinee seeks an accommodation that would preclude accurate evaluation of abilities measured by the test, denial of the requested accommodation is not unlawful. *Powell,* 364 F.3d at 89; 28 C.F.R. § 36.309(b)(3) (accommodations need not be made if they would "fundamentally alter the measurement of the skills or knowledge the examination is intended to test"). *See also Florida Bd. of Bar Exam'rs re S.G.,* 707 So.2d 323, 325 (Fl. 1998) ("A modification in the scoring of an exam is, by its very

nature, a modification which 'fundamentally alters the measurement of the skills or knowledge the examination is intended to test' . . . [and] is not required under the ADA." (quoting 28 C.F.R. § 36.309(b)(3)).

In *Jacobson v. Tillman,* 17 F. Supp. 2d 1018 (D. Minn. 1998), the plaintiff claimed the Minnesota Board of Teaching had discriminated against her on the basis of her disabilities, dyslexia and dyscalculia, by refusing to award her a license to teach after she failed the math requirement of the Minnesota Teacher Qualification Test numerous times. The District Court found that the plaintiff's request for waiver of the math portion of the test sought an "unreasonable modification that would fundamentally alter the nature of Minnesota's certification of qualified individuals . . . to teach the children of the State." *Id.* at 1026. The Court noted that the State, which must publicly validate the competency of teachers by issuing a license, is "entitled to demand and receive an objective demonstration of competence" and the plaintiff was "simply unable to objectively demonstrate math competence by passing a properly chosen and administered test." *Id.* at 1025.

Demonstration of the examinee's ability to spell, punctuate, capitalize and paragraph is an inherent part of the LAST. Falchenberg seeks an accommodation that would permit her to avoid having to demonstrate these skills. Falchenberg's request thus seeks a modification that would fundamentally alter the nature of the LAST.

> The relevant statutes . . . mandate reasonable accommodation of people with disabilities in order to put them on an even playing field with the non-disabled; it does not authorize a preference for disabled people generally. . . . The obligation to make reasonable accommodation . . . does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability.

Hartnett, 400 F. Supp. 2d at 576 (quotations and alterations omitted). All candidates for teacher certification who take the LAST in New York, disabled or non-disabled, are evaluated according to the same standards, including spelling, punctuation, capitalization, and paragraphing. Exempting Plaintiff from demonstrating the same level of competency in these skills as all other examinees would not "put [her] on an even playing field with the non-disabled." *Id.*

Falchenberg disputes the proposition that her requested accommodation would conflict with the goals of the LAST, but fails to rebut the evidence offered by Defendants that the LAST measures every candidate's spelling, punctuation, capitalization, and paragraphing. Contrary to Falchenberg's contentions, the LAST essay represents approximately 20% of the LAST score. The scoring scale for the essay appears in the Preparation Guide and each of the four possible scores for a candidate's essay expressly includes consideration of the candidate's "mechanical skills," the definition of which includes "misspellings of common words." If a skill is measured, it is fundamental

to the examination at issue, and a requested accommodation that would waive measurement of the skill need not be granted as a matter of law. *See* 28 C.F.R. §36.309(b)(1)(i).

Falchenberg seeks to rebut the evidence that the LAST evaluates examinees' spelling, punctuation, capitalization and paragraphing, contending that "not one witness had knowledge" as to whether these skills are fundamental to the LAST. Plaintiff's Memorandum of Law Opposition to Defendant's Motion for Summary Judgment ("Pl. Opp.") 4. She seeks to rely on the deposition testimony of NES's designated corporate deponent, who, in response to a question seeking information on "how NES scores or treats spelling, punctuation, capitalization, or other mechanics of the writing process," stated that she had no such knowledge. *Id.* at 5. However, Plaintiff's 30(b)(6) Notice did not identify the particulars of scoring as a topic of the examination. "[I]f a party opts to employ the procedures of Rule 30(b)(6), F.R.Civ.P., to depose the representative of a corporation, that party must confine the examination to the matters stated 'with reasonable particularity' which are contained in the Notice of Deposition." *Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 730 (D. Mass. 1985) (quoting Fed. R. Civ. P. 30(b)(6)). Questions and answers exceeding the scope of the 30(b)(6) notice will not bind the corporation, but are merely treated as the answers of the individual deponent. *See Detoy v. City & County of San Francisco,* 196 F.R.D. 362, 367 (N.D. Cal. 2000); *accord King v. Pratt & Whitney,* 161

F.R.D. 475, 467 (S.D. Fla. 1995) *aff'd,* 213 F.3d 646 (11th Cir. 2000). As these courts noted, "if the [30(b)(6)] deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem." *Detoy,* 196 F.R.D. at 367; *King,* 161 F.R.D. at 467.

Falchenberg also challenges the proposition that the ability to "dictate" or "memorize" the spelling of words is fundamental to the LAST. Disputing Defendants' assertion that "[i]t is simply not possible to test Plaintiff's spelling skills without requiring that she spell," Pl. Opp. 9, Falchenberg contends that she should only have to demonstrate that she can use external spelling aids such as dictionaries or spell checkers.

Falchenberg never requested the use of a spell checker as an accommodation for the LAST. Her challenge to Defendants' prohibition of the use of a spell checker relies on the argument that "all of the other 49 States in the nation" allow a spell checker as an accommodation for teacher certification tests. *Id.* at 10. There is no evidence in the record that any of the tests alluded to by Falchenberg evaluate examinees on the basis of their spelling. Obviously, the use of a spell checker on an examination that does not test spelling would not fundamentally alter the measurement of the skills or knowledge the examination is intended to test. Without evidence that such tests actually test spelling, Plaintiff's attempt to analogize them to the LAST fails.

Falchenberg has also challenged the proposition that the skills measured by the LAST are "justified by anything that a teacher actually does in the classroom." Pl. Opp. 12. It has already been held that "the certification examination is not an issue in this case. There is no allegation that "the certification test itself is discriminatory. . . ." July 1 Opinion, at 348-49.

Furthermore, Falchenberg herself has admitted in deposition that spelling, punctuation, capitalization, and paragraphing are important skills that students should learn, that teachers must be able to teach these fundamental skills, and that teachers must be able to demonstrate they possess, and are capable of teaching, these skills.

Finally, Plaintiff's challenge to the basis, objectives, or grading criteria of the LAST fails in light of the academic deference doctrine. The professional judgment of educators making academic decisions is afforded "great deference." *Powell,* 364 F.3d at 88; *see also Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 225 (1985). Where a program is designed to "achieve definite pedagogical objectives," this Court will not "substitute its judgment for that of experienced education administrators and professionals in assessing whether the program does in fact meet its pedagogical objectives." *Maczaczyj v. New York,* 956 F. Supp. 403, 409 (W.D.N.Y. 1997).

B. The Aiding and Abetting Claims Are Dismissed

Because aiding and abetting is a viable theory only where an underlying violation has been shown, *see United States v. Reifler,* 446 F.3d 65, 96 (2d Cir. 2006) (government must prove commission of underlying crime to sustain aiding and abetting conviction), Falchenberg's aiding and abetting claim is dismissed as well.

C. NES is Not Subject to the Rehabilitation Act or Title II of the ADA

The Rehabilitation Act prohibits discrimination by any "program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794(a); *see also Powell,* 364 F.3d at 85 ("[T]he focus of the Rehabilitation Act is narrower than the ADA's in that its provisions apply only to programs receiving federal financial assistance."). Defendant NES does not receive federal financial assistance for the LAST or for any other purpose.

Title II of the ADA (Plaintiff's Second Claim for Relief) only applies to "public entities," defined as "(A) any state or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government. . . ." 42 U.S.C. § 12131(1). NES is not a public entity as defined by the ADA.

C. The State Defendants Are not Subject to Title III

Falchenberg, by her third claim for relief, asserts claims against State Defendants pursuant to Title III of the ADA. Am. Compl. ¶ 33. However, "ADA Title III expressly does not apply to public entities, including local governments." *Bloom v. Bexar County,* 130 F.3d 722, 726 (5th Cir. 1997). A claim under Title III of the ADA can only be asserted against a private entity engaged in the provision of public accommodations, such as an inn, hotel or restaurant. *See* 42 U.S.C. §§ 12181(7), 12182. Title III is not applicable to public entities. *See Bloom,* 130 F.3d at 726 (dismissing ADA Title III claim asserted against public entity); *DeBord v. Board of Educ. of the Ferguson-Florissant Sch. Dist.*, 126 F.3d 1102, 1106 (8th Cir. 1997) (same), *cert. denied,* 523 U.S. 1073 (1998); *Sandison v. Michigan High Sch. Athletic Ass'n,* 64 F.3d 1026, 1036 (6th Cir. 1995) (same).

D. The Eleventh Amendment Bars the Title II and State Claims Against the State Defendants

The Eleventh Amendment of the Constitution bars federal suits against a State absent the State's waiver of its sovereign immunity or an abrogation of that immunity by Congress. *See Will v. Mich. Dep't of State Police,* 491 U.S. 58, 66 (1989) (Eleventh Amendment bars suits against State "unless the State has waived its immunity . . . or unless Congress has exercised its undoubted power under § 5 of the

Fourteenth Amendment to override that immunity"). This bars applies to suits that seek money damages, *see Edelman v. Jordan,* 415 U.S. 651, 663 (1974) or injunctive relief, *see Cory v. White,* 457 U.S. 85, 90-91 (1982).

Eleventh Amendment immunity "extends . . . not only to a state, but also to entities considered arms of the state." *McGinty v. New York,* 251 F.3d 84, 95 (2d Cir. 2001) (quotation omitted). SED is an arm of the State of New York, and thus enjoys Eleventh Amendment immunity. *See United States v. City of Yonkers,* 96 F.3d 600, 619 (2d Cir. 1996) (dismissing § 1983 claims against SED on Eleventh Amendment grounds). Consequently, both the State of New York and SED are entitled to Eleventh Amendment immunity from Plaintiff's claims, absent a waiver or abrogation thereof.

The State Defendants have moved to dismiss Falchenberg's Title II claim as barred by the Eleventh Amendment. In *United States v. Georgia,* 546 U.S. 151, 154 (2006), the Supreme Court directed that in evaluating the proper application of the Eleventh Amendment to Title II claims, the courts should determine, on a claim-by-claim basis:

> (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity

> as to that class of conduct is nevertheless valid.

546 U.S. at 159. This Court has already determined that the State Defendants are entitled to summary judgment on the question of whether their conduct violated Title II. That holding obviates the need for a full Eleventh Amendment analysis.

Falchenberg's fourth, fifth and sixth claims for relief assert claims against State Defendants under the NYSHRL and NYCHRL. Am. Compl. ¶¶ 35, 37, 40. However, there is no valid waiver or abrogation of immunity with respect to these claims. *See Tuckett v. N.Y. State Dep't of Taxation and Fin.*, No. 99 Civ. 0679, 2000 WL 1028662, at *2 (S.D.N.Y. Jul. 26, 2000) ("[N]othing in the text of the [NYS]HRL constitutes a waiver of immunity or consent to be sued."); *Leiman v. State of New York*, 2000 WL 1364365, at *7 (S.D.N.Y. Sept. 21, 2000) ("[E]ven if it were possible for New York City to waive New York State's immunity, plaintiff could not demonstrate that the Administrative Code contains the explicit language needed to do so."), *aff'd*, 2001 WL 363520 (2d Cir. Apr. 11, 2001).

E. Falchenberg's Motion to Amend Is Denied

After being served with a responsive pleading, a party may amend its pleading "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Leave to amend a complaint

pursuant to Rule 15 should not be denied unless there is evidence of undue delay, futility, bad faith, or undue prejudice to the non-movant. *See Foman v. Davis,* 371 U.S. 178, 182 (1962); *Milanese v. Rust-Oleum Corp,* 244 F.3d 104, 110 (2d Cir. 2001).

Where a cross-motion to amend the complaint is brought in response to a motion for summary judgment,

> even if the amended complaint would state a valid claim on its face, the court may deny the amendment as futile when the evidence in support of the plaintiff's proposed new claim creates no triable issue of fact and the defendant would be entitled to judgment as a matter of law under Fed. R. Civ. P. 56(c).

Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001); *see also Azurite Corp. Ltd. v. Amster & Co.,* 844 F. Supp. 929, 939 (S.D.N.Y. 1994), *aff'd* 52 F.3d 15 (2d Cir. 1995).

The claims that Falchenberg would add against Commissioner Mills rely on the same factual and legal predicates as her claims against the Defendants, upon which they are entitled to summary judgment. Falchenberg's proposed amendments of the Complaint thus do not create triable issues of fact and her motion to amend is denied as futile.

Conclusion

For the foregoing reasons, Defendants' Motion for Summary Judgment is granted and Falchenberg's motions are denied.

Enter judgment on notice.

It is so ordered.

New York, N.Y.
July 9, 2008

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of July, two thousand and nine.

Present:

HON. JOHN M. WALKER, JR.,
HON. RICHARD C. WESLEY,
HON. J. CLIFFORD WALLACE,*
Circuit Judges.

MARSHA FALCHENBERG,

Plaintiff-Appellant,

-v.- No. 08-3602-cv

NEW YORK STATE DEPARTMENT OF EDUCATION, STATE OF NEW YORK AND NATIONAL EVALUATION SYSTEMS, INC., ALSO KNOWN AS NYSTE PROGRAM,

Defendants-Appellees,

NEW YORK CITY DEPARTMENT OF EDUCATION AND CITY OF NEW YORK,

Defendants.

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* The Honorable J. Clifford Wallace, United States of Appeals for the Ninth Circuit, sitting by designation.

(Filed Jul. 16, 2009)

Appellant Marsha Falchenberg having filed a petition for panel rehearing and the panel that determined the appeal having considered the request.

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez
Frank Perez, Deputy Clerk

STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 12182 – Prohibition of discrimination by public accommodations

(a) General rule – No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

(2) Specific prohibitions

(A) Discrimination – For purposes of subsection (a) of this section, discrimination includes –

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the

entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden. . . .

* * *

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42 U.S.C. § 12189 – Examinations and courses

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

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28 C.F.R. § 36.309 – Examinations and courses.

(a) *General.* Any private entity that offers examinations or courses related to applications,

licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

(b) *Examinations.* (1) Any private entity offering an examination covered by this section must assure that –

(i) The examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure);

(ii) An examination that is designed for individuals with impaired sensory, manual, or speaking skills is offered at equally convenient locations, as often, and in as timely a manner as are other examinations; and

(iii) The examination is administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements are made.

(2) Required modifications to an examination may include changes in the length of time permitted for completion of the examination and adaptation of the manner in which the examination is given.

(3) A private entity offering an examination covered by this section shall provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills, unless that private entity can demonstrate that offering a particular auxiliary aid would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden. Auxiliary aids and services required by this section may include taped examinations, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments, Brailled or large print examinations and answer sheets or qualified readers for individuals with visual impairments or learning disabilities, transcribers for individuals with manual impairments, and other similar services and actions.

(4) Alternative accessible arrangements may include, for example, provision of an examination at an individual's home with a proctor if accessible facilities or equipment are unavailable. Alternative arrangements must provide comparable conditions to those provided for nondisabled individuals.

(c) *Courses.* (1) Any private entity that offers a course covered by this section must make such modifications to that course as are necessary to

ensure that the place and manner in which the course is given are accessible to individuals with disabilities.

(2) Required modifications may include changes in the length of time permitted for the completion of the course, substitution of specific requirements, or adaptation of the manner in which the course is conducted or course materials are distributed.

(3) A private entity that offers a course covered by this section shall provide appropriate auxiliary aids and services for persons with impaired sensory, manual, or speaking skills, unless the private entity can demonstrate that offering a particular auxiliary aid or service would fundamentally alter the course or would result in an undue burden. Auxiliary aids and services required by this section may include taped texts, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments, Brailled or large print texts or qualified readers for individuals with visual impairments and learning disabilities, classroom equipment adapted for use by individuals with manual impairments, and other similar services and actions.

(4) Courses must be administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements must be made.

(5) Alternative accessible arrangements may include, for example, provision of the course through videotape, cassettes, or prepared notes. Alternative

arrangements must provide comparable conditions to those provided for nondisabled individuals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

MARSHA FALCHENBERG, 08-3602-CV

Plaintiff-Appellant,

-v.-

NEW YORK STATE DEPARTMENT OF EDUCATION, STATE OF NEW YORK, and NATIONAL EVALUATIONS SYSTEMS, INC., also know as NYSTE PROGRAM

Defendants-Appellees,

NEW YORK CITY DEPARTMENT OF EDUCATION and CITY OF NEW YORK,

Defendants.

----------x

TRANSCRIPT OF ORAL ARGUMENT EXCERPTS[1]

The Court: Mr. Smith. Good Morning.

Nathaniel Smith: Thank you, your Honor, I'm Nathaniel Smith. May it please the Court, for the Appellant-Plaintiff, Marsha Falchenberg.

---

[1] The following is a transcript of an excerpt of the oral argument before the Second Circuit on May 12, 2009 before Judges Walker, Wesley and Wallace based on an audio recording of the oral argument.

Falchenberg worked as a public school teacher for two years in the New York school system without a hitch, without any problems at all, good performance reviews, glowing reference letters. She had dyslexia and there was an obligation imposed on her, as was imposed on any teacher, to take a teacher certification test known as the LAST. She asked for an oral examination, which is a standard accommodation for people with her kind of disability, and she was denied that accommodation.

The Court: Can we go to the essence of the case, which is that after all was said and done, after the history of this thing was done, there was no, she was given an oral examination and she was given a person who could respond and the only real issue was whether she had to spell out the words, the spelling, the punctuation, the paragraphing and the capitalization of her essay. Isn't that really what this is coming down to?

Nathaniel Smith: Yes, I think that gets to really the overlying core problem here is that ultimately after jumping through a lot of hoops . . .

The Court: Isn't that what's in dispute? At this point.

Nathaniel Smith: Well . . .

The Court: You're saying that the fact that they have a reader of the examination and the fact that somebody else will transcribe her answers verbally given is not sufficient that she should also not

be held responsible for spelling, punctuation, paragraphing and capitalization.

Nathaniel Smith: Well, that is not our position, what NES told her was you can have a reader, you can have a transcriber but while you are formulating your essay you have to not only create the essay in your head but you also have to dictate spelling, punctuation, capitalization and paragraphing.

The Court Exactly. That's right. We are in agreement.

Nathaniel Smith: OK, well she does disagree with it, that's an almost impossible task as both experts agreed.

The Court: That may be true for dyslexics, but you know if I have two amputees and I want to enter the world of professional, if my arms have been amputated and I want to enter the world of professional golf, I can't have somebody else make my shots for me. This is, this goes to the essence of what they were trying to test.

Nathaniel Smith: Judge Walker, I'm glad you brought up the amputee because in the *PGA/Martin* case. . . .

The Court: That was different because that debated over whether walking was required as opposed to riding in a golf cart and there was a very powerful dissent in my view on that subject, that walking is a part of the game. But leave that aside,

you know, sometimes people have disabilities that simply, flatly do not qualify them for a particular position.

Nathaniel Smith: The question is then, following your logic your Honor, is that why wasn't she offered a spell checker or some other device? That gets you further down into the deeper core issues in this case. . . .

The Court: Then why would she? A, she didn't ask for a spell checker, B, she has self-admitted that, she taught third grade, one of the times she was teaching was third grade right? She said she herself that in grading the children's papers she had to correct spelling errors so one would think that one would know that how one spells separate, S-E-P-E-R-A-T-E, separ*ate,* that becomes important and how, and she never really contested that spelling isn't an important function of teaching.

Nathaniel Smith: There is no question, your Honor. . . .

The Court: Then why should she get a spellchecker?

Nathaniel Smith: Because. . . .

The Court: I mean spell checkers ruin, I can never remember whether there are two rr's or two ff's in sheriff anymore.

* * *

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No. 09-471

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

MARSHA FALCHENBERG,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF EDUCATION, THE STATE OF NEW YORK, AND NATIONAL EVALUATION SYSTEMS, INC., A/K/A NYSTE PROGRAM,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT NATIONAL EVALUATION SYSTEMS, INC.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May Respondents lawfully require Petitioner to demonstrate her ability to spell on a teacher certification examination that includes spelling among its evaluated skills?

CORPORATE DISCLOSURE STATEMENT OF RESPONDENT NATIONAL EVALUATION SYSTEMS, INC.

Respondent National Evaluation Systems, Inc. ("NES") does business as Evaluation Systems group of Pearson and is a business unit of NCS Pearson, Inc. NCS Pearson, Inc. is ultimately owned by Pearson plc (a company based in the United Kingdom).

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INTRODUCTION

This case arises from Petitioner's request for an accommodation that would have excused her from demonstrating her ability to spell on a teacher-certification examination that includes spelling among its tested skills. As both the District Court and the Second Circuit Court of Appeals correctly held, the requirement that a disabled individual demonstrate skills objectively measured on a licensing or certification examination does not, as a matter of law, discriminate on the basis of a disability. Because these courts' decisions are squarely grounded in the express text of the Americans with Disabilities Act and this Court's prior decisions, and because Petitioner expresses little more than a disagreement with these courts' application of this settled law to the facts, this case presents no compelling ground for further review. This Court should refuse to grant the requested writ of certiorari.

Granting the writ is particularly inappropriate in this case because, were this Court to grant the writ, a significant amount of briefing would necessarily be dedicated to the correction of factual errors in Petitioner's briefing. Petitioner has mischaracterized or misstated facts that are in the record. It is therefore a primary purpose of this opposition, pursuant to Sup. Ct. R. 15, to address and preserve Respondent's objections to misstatements of fact in the petition.

STATEMENT OF THE CASE

Petitioner requested as an accommodation for her disability an exemption from the requirement that she demonstrate her ability to spell on a teacher-certification examination. Her requested accommodation was denied because the examination evaluates every candidate's ability to spell. Therefore, the requested exemption, if granted, would have prevented the accurate measurement of Petitioner's performance on the examination. The law expressly permits denial of an accommodation under these circumstances.

The examination at issue in this case is the Liberal Arts and Sciences Test ("LAST"), a teacher-certification examination that all candidates for public-school teacher certification in the State of New York are required by law to take and pass in order to become certified teachers. Respondent NES developed, administers and scores the LAST under contract with the State of New York. The LAST is a "paper-and-pencil" test, consisting of multiple-choice questions and a written assignment (essentially a short written essay).

The record establishes without genuine dispute that among the scored skills on the LAST's written assignment are proper construction of paragraphs and sentences; proper use of grammar; proper punctuation and capitalization; and, most importantly for the purposes of the petition, correct spelling. The written assignment requires the examinee to "[p]repare

an organized, developed composition in edited American English in response to instructions regarding audience, purpose, and content." It is required to be the examinee's original work, written in his or her own words, and not copied or paraphrased from some other work. The examinee's response to the written assignment is measured (i.e., scored) on the basis of several criteria, among them the following:

> STRUCTURE AND CONVENTIONS: Express oneself clearly and without distractions caused by inattention to sentence and paragraph structure, choice and use of words, and mechanics (i.e., spelling, punctuation, capitalization).

The written assignment is evaluated and scored on a 4-point scale, with "4" being the highest score and "1" being the lowest. Each of the four possible scores is based on consideration of a number of factors, including spelling, punctuation, capitalization, and paragraphing. For example, a "4" response is described in the LAST scoring scale in pertinent part as follows:

> The response is free of distracting flaws in sentence structure (e.g., subject-verb disagreements, run-on sentences) and paragraph structure (e.g., lack of paragraph breaks to coincide with thought transitions), shows proficient use and choice of words, and avoids disruptive mechanical errors (e.g., inappropriate capitalization, misspellings of common words).

These scoring criteria are clearly set forth in the LAST Preparation Guide, which was introduced into evidence in the District Court.

Petitioner Marsha Falchenberg registered to take the LAST several times in 2002 and 2003. Relying on a claimed disability that impairs her ability to spell many words correctly, Petitioner sought certain testing accommodations to compensate for her disability. Specifically, in her final registration for the LAST, Petitioner requested the following accommodations: "reader, scriber, extra time, oral." In response, NES offered to provide Petitioner with a reader to read each test question to her; a transcriber to write down her dictated written assignment for her; extra time to take the test, and a separate room to avoid distractions from other test takers. But because spelling, punctuation, capitalization and paragraphing are among the skills evaluated in scoring the written assignment on the LAST, NES specified that Petitioner would be required to indicate to the transcriber her own spelling, punctuation, capitalization and paragraphing, so that the skills being evaluated would be those of Petitioner and not those of her transcriber. Petitioner objected to this requirement and failed to appear to take the LAST.

After learning that she would be required to demonstrate her own spelling (and other skills) on the LAST, Petitioner sued Respondent NES, the State of New York, the New York State Education Department, the New York City Department of Education, and the City of New York. She alleged that these

parties failed reasonably to accommodate her claimed disability on the LAST, and that this alleged failure resulted in her termination as a New York City public-school teacher. She asserted claims under Titles II and III of the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, the New York State Human Rights Law, and the New York City Human Rights Law. She also sought to hold the Defendants liable under various theories of aiding-and-abetting liability.

Importantly, Petitioner's pleadings, even as amended, include no allegation that the LAST is *itself* discriminatory or otherwise unlawful. Thus, Petitioner has never challenged the validity or job-relatedness of the LAST. Accordingly, Petitioner's arguments that testing spelling is unrelated to the underlying purpose of the LAST are unsupported by the procedural and evidentiary history of this case.

Petitioner's briefing contains several other misstatements or mischaracterizations of the factual record, the most egregious of which are addressed here to preserve Respondent's objections to misstatements of fact in the petition pursuant to Sup. Ct. R. 15.

First, Petitioner was granted every reasonable accommodation she requested. In response to Petitioner's request for the accommodations of a "reader, scriber, extra time, [and] oral," NES offered to provide Petitioner with a reader to read each test question to her, a transcriber to write down her dictated written

assignment for her, extra time to take the test (nine hours rather than the normal four hours), and a separate room to avoid distractions from other test takers. Petitioner does not take issue with any of the granted accommodations, but argues that the requirement that Petitioner indicate to the transcriber her own spelling, punctuation, capitalization and paragraphing violates federal law.

Second, contrary to the suggestions in her briefing, Petitioner never requested the use of a spellchecker on the LAST. Although she at one point requested a dictionary, that request was denied – and subsequently withdrawn by Petitioner – because it would fundamentally alter the measurement of certain of the skills the LAST is intended to test (e.g., spelling). Petitioner is correct that spellcheckers are not permitted on the LAST – to permit outside assistance with spelling on the examination (either through a mechanical spelling aid or a human spelling assistant) would obviously interfere with the scoring of the LAST. But Petitioner never requested a spellchecker, so her argument addressing the prohibition on the use of spellcheckers addresses nothing more than a hypothetical.

Third, Petitioner is incorrect that a spellchecker was ever permitted as an accommodation on the LAST. Contrary to Petitioner's statements on pages 3 and 4 of her petition, there is no evidence in the record establishing that a spellchecker, or any other

spelling aid, has ever been permitted on the LAST.[1] In fact, spellcheckers are specifically *excluded* as an available alternative testing arrangement on the LAST, because such an accommodation may not ensure the accurate assessment of the required knowledge and skills that are being tested.

Another egregious misstatement of the record is Petitioner's contention that forty-nine states other than New York permit the use of a spellchecker on teacher-certification examinations. First, as mentioned, Petitioner never requested the use of a spellchecker. Second, there is no competent evidence in the record that *every* other state in the country permits the use of a spellchecker on all teacher-certification examinations. Third, there is no evidence in the record that any of the teacher-certification tests in the states that do permit spellcheckers evaluate candidates *on the basis of their spelling*. Obviously, the use of a spellchecker on other examinations that do not test spelling would not fundamentally alter a tested skill. Without evidence that such tests actually test spelling, as the LAST indisputably does, Petitioner's misleading attempt to analogize them to the LAST fails.

---

[1] Spellcheckers have been permitted in the past on certain New York teacher certification tests that do not evaluate spelling as a test scoring criterion. But those aids have never been permitted on the LAST, and Petitioner has offered no evidence to the contrary.

Finally, Petitioner mischaracterizes the District Court's opinion. The District Court did not hold that "any alteration of a test procedure is a fundamental alteration as a matter of law." (Petition at 6.) Rather, the District Court held that an accommodation that would prevent the evaluation of a measured skill effectuates a fundamental alteration. Because the requested accommodation in this case would prevent accurate measurement of Falchenberg's spelling, Falchenberg is not requesting alteration of a "test procedure"; instead, she is requesting an alteration that would prevent evaluation of a measured skill. Perhaps another case exists where "alteration of a test procedure" would not fundamentally alter the examination, but those are not the facts of this case.

The United States District Court for the Southern District of New York, after dismissing the New York City Defendants in a previous order, granted the motions for summary judgment of NES and the New York State Defendants on all claims. Petitioner appealed that decision to the Court of Appeals for the Second Circuit. In an opinion grounded squarely in the text of the ADA and this Court's jurisprudence, the Second Circuit affirmed the District Court, holding in relevant part that (1) it is factually undisputed that spelling is among the skills tested on the LAST; (2) Petitioner's competency at spelling cannot be tested without requiring her actually to spell; and (3) Petitioner's request for an accommodation that would not require her to spell would effectuate precisely the type of fundamental alteration that need not be granted as a matter of law.

Petitioner promptly moved for reconsideration of that affirmance, filing her motion on June 22, 2009. The Second Circuit denied that motion on July 16, 2009, and this petition for certiorari followed.

REASONS FOR DENYING THE WRIT

1. The ADA Expressly Permits Test Administrators to Deny a Requested Accommodation that would Prevent the Measurement of a Tested Skill.

Disabled individuals are entitled to receive "reasonable accommodations" that permit them to have access to and take a meaningful part in public services and public accommodations. *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir. 2004); *see generally* 42 U.S.C. § 12182(a) (setting forth the ADA's general rule prohibiting public accommodations from discriminating against individuals because of their disabilities). But by the plain language of the ADA, a requested accommodation that would "fundamentally alter" the service, program, or activity being provided (in this case, the LAST certification examination), need not be granted as a matter of law. 42 U.S.C. § 12182(b)(2)(A)(ii); *see also* 28 C.F.R. § 35.130(b)(7) (same); *PGA Tours, Inc. v. Martin*, 532 U.S. 661, 682 & 688-690 (2001) (accommodation that would effect fundamental alteration of service provided, including waiver of "an essential rule . . . for anyone," need not be granted).

For certification examinations such as the LAST, the Code of Federal Regulations provides guidance for determining whether a requested accommodation effectuates a "fundamental alteration." Examinations must be selected and administered so as to ensure that, when administered to an individual with a disability, the examination results do not reflect the individual's impaired ability or skill, "*except where those skills are the factors that the examination purports to measure. . . .*" 28 C.F.R. § 36.309(b)(1)(i) (emphasis added); *see also* 28 C.F.R. § 36.309(b)(3) (requests for accommodation on examination need not be granted if they would "fundamentally alter the measurement of the skills or knowledge the examination is intended to test. . . ."). Thus, where a test applicant seeks an accommodation that would prevent resulting scores from accurately evaluating skills intended to be measured by the test, the denial of the requested accommodation is appropriate. *Powell*, 364 F.3d at 89; *see also Florida Bd. of Bar Examiners re S.G.*, 707 So. 2d 323, 325 (Fl. 1998) ("A modification in the scoring of an exam is, by its very nature, a modification which 'fundamentally alters the measurement of the skills or knowledge the examination is intended to test' . . . [and] is not required under the ADA.").

Two uncontested material facts establish that Petitioner's requested accommodation in this case would fundamentally alter the LAST by preventing Respondent from accurately evaluating the skills the examination intends to measure:

- Spelling is measured in scoring every candidate's performance on the LAST.
- Petitioner's requested accommodation for an "oral" examination, *without* the requirement that she demonstrate her spelling to a transcriber, would prevent Respondent from measuring Petitioner's ability to spell.

This case begins and ends with these facts. If Petitioner were excused from indicating her own spelling ability to a transcriber, the resulting composition would exhibit the transcriber's spelling skill, not Petitioner's. Similarly, if Petitioner were permitted to use a dictionary – or any spelling aid, such as a mechanical spellchecker – it would prevent Petitioner's spelling from being assessed at all. The obvious and inescapable consequence would be that Petitioner's score on the LAST would not mean the same thing as the identical score by another test-taker. Accordingly, the District Court did not err in granting summary judgment, and the Second Circuit's affirmance is appropriate.

Petitioner does not argue that the authorities cited by Respondent are incorrect, inconsistent with the ADA, or unconstitutional. Rather, her primary contention appears to be that the District Court and Second Circuit's decisions are inconsistent with this Court's decision in *PGA Tours, Inc. v. Martin*, 532 U.S. 661 (2001). That contention is misplaced.

In *Martin*, this Court held that a disabled golfer's request to use a golf cart in a professional golfing tournament would not fundamentally alter the nature of the tournament. Mr. Martin required a golf cart to move about a golf course because of a condition resulting in congenital leg weakness. The PGA Tour, claiming that walking was part of the game of golf, barred his use of golf carts. He brought suit, claiming he was deprived of a reasonable accommodation.

The magistrate judge in *Martin* found that the ability to walk distances was incidental to the game of golf, which is fundamentally about the ability to plan and execute golf shots. This Court agreed, noting that the use of carts is not itself inconsistent with the fundamental character of the game of golf, which is the ability to make shots using clubs in as few strokes as possible. 532 U.S. at 683. Because the rule banning carts was at best "peripheral" to the game of golf, Mr. Martin's requested accommodation did not fundamentally alter the service provided. *Id.* at 690.

Importantly, Mr. Martin did not seek an accommodation that altered a measured skill in the game of golf. For example, he did not ask for a several stroke handicap on every hole, for larger-diameter holes, or for a shorter distance to the hole that would apply only to him. In contrast, Petitioner has asked for an accommodation that does interfere with measurement of a tested skill, and which is therefore not incidental or peripheral to the LAST. Spelling is a specifically-measured skill on the LAST. The use of a

spellchecker or other spelling aid on the LAST would directly interfere with NES's evaluation of Petitioner's spelling, and would thus effect a fundamental alteration of the examination wholly unlike the use of a golf cart in the game of golf.

The Court in *Martin* also found that the purpose of the PGA Tour walking rule is to subject players to fatigue, and that Mr. Martin's disability would cause him to endure greater fatigue even with a cart than his able-bodied competitors do by walking. Accordingly, the purpose of the walking rule was not fundamentally altered by allowing Mr. Martin to use a cart. *Id.* at 690. In contrast, the purpose of the rule banning spellcheckers (and of the proviso requiring Petitioner to indicate her own spelling to a transcriber) is to permit NES to evaluate every examinee's spelling. If Petitioner were permitted to use a spellchecker, or if the transcriber spelled words for her, then NES could not evaluate Petitioner's spelling. Accordingly, Petitioner's request to be relieved from demonstrating her own spelling, if granted, would fundamentally alter the purpose of New York's requirement that every LAST examinee demonstrate his or her own ability to spell. Similarly, Petitioner's request is antithetical to the well-established principle that NES is *not* required to alter or waive measurement of the skills objectively measured by the LAST. *See* 42 U.S.C. § 12182(b)(2)(A)(ii), *supra*; 28 C.F.R. § 36.309(b)(3), *supra*.

Petitioner's request to be excused from demonstrating spelling and other cores skills is not a

request for an accommodation. Rather, Petitioner is asking for a fundamentally different examination that only she would take. The State is not obligated to certify teachers who cannot pass fair and valid tests of basic skills. NES granted every reasonable accommodation Petitioner requested, and NES is not liable under the ADA simply because Petitioner is unable, even with a full panoply of reasonable accommodations, to pass a properly chosen and administered test.[2]

The District Court and the Court of Appeals were competent to consider and decide whether the request to be excused from demonstrating spelling on the LAST would effectuate a fundamental alteration if granted. If this Court granted the writ of certiorari in this case, its resolution of this case would require nothing more than a re-examination of the same facts considered by these courts. The petition for writ therefore raises no compelling issues, and should be denied.

---

[2] In fact, Petitioner has never taken the LAST examination, with or without the requested accommodations. Petitioner's failure to take the LAST provided an independent ground for the dismissal of her Complaint at summary judgment, as she cannot establish a "concrete and particularized" injury-in-fact that is neither conjectural nor hypothetical, and consequently lacks the actual injury necessary for Article III standing to pursue claims with respect to the administration of the LAST. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

2. Petitioner's Argument that New York Alone Among the States Prohibits Spellcheckers on Teacher Certification Examinations is Unsupported by Any Competent Evidence.

Petitioner challenges NES's prohibition on the use of a spellchecker (which she never requested) by declaring that "the rest of the country permits a spell checker as an accommodation for the essay portions of their teacher's certification tests." (Petition at 10). This challenge is not supported by competent evidence. First, Petitioner never requested a spellchecker. Her challenge to New York's prohibition on the use of spellcheckers on the LAST therefore presents a hypothetical question unrelated to the request for accommodations actually at issue in this case. Second, and most importantly, Petitioner makes the bare assertion that the other forty-nine states permit the use of a spellchecker. Although the record contains evidence that some other states permit a spellchecker for certain examinations, there is no evidence in the record that any of the tests in any other state evaluate candidates *on the basis of their spelling*. Obviously, the use of a spellchecker on other examinations that do not test spelling would not fundamentally alter a tested skill. Petitioner's failure to demonstrate that these tests, like the LAST, evaluate spelling skills renders this evidence meaningless. This argument thus creates no compelling reason for granting the writ of certiorari in this case.

3. The Courts Below Appropriately Interpreted the Applicable Sections of the ADA.

As her final argument, Petitioner argues that courts generally apply the ADA too narrowly. But Petitioner fails to articulate how the courts *in this case* applied the ADA too narrowly. As explained *supra*, the District Court and the Second Circuit properly applied clearly-defined law that the Petitioner does not challenge. Indeed, the one code section that Petitioner cites in support of this argument simply has nothing to do with this case. Petitioner cites the ADA Amendments Act of 2008, which broadens the definition of the term "disability" under the Act. But for the purposes of the summary-judgment issue now on appeal, Respondent conceded (and the courts below assumed) that Petitioner has the requisite disability. This argument, like the rest of the petition, provides no basis for granting the writ of certiorari in this case.

CONCLUSION

The objective measurement of tested skills does not violate any person's right to reasonable accommodations under the Americans with Disabilities Act. The Court of Appeals for the Second Circuit properly stated this rule of law, and properly reviewed the District Court's application of that law to the facts of this case. The Petitioner raises nothing more than a disagreement with the factual findings of these

courts. Petitioner's obstinate disagreement with those findings provides no compelling reason for this Court to exercise its discretion to grant the requested Writ of Certiorari. Respondent respectfully requests that this Court deny the petition.

This 18th day of November, 2009.

Respectfully submitted,

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No. 09-471

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In The Supreme Court of the United States

MARSHA FALCHENBERG,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF EDUCATION, THE STATE OF NEW YORK, and NATIONAL EVALUATION SYSTEMS, INC., a/k/a NYSTE PROGRAM,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner submits this Brief in reply to NES's Brief in Opposition (the "NES Brief"). The other Respondents have waived their right to submit opposition briefs.

In its Brief, NES contends that the Petition should not be granted because any type of external spelling aid (an oral examination, a dictionary, a transcriber or a spell checker) would interfere with NES's evaluation of Petitioner's ability to prepare an essay that is graded for, among other things, spelling. (NES Brief at 11.) NES also contends that Petitioner misstates or mischaracterizes the Record. (NES Brief at 5-8.) We briefly respond to these two contentions below.

I. REASONS FOR GRANTING THE WRIT

The central issue in this case is whether an external spelling aid, such as a spell checker, a dictionary or a transcriber, would fundamentally alter the LAST. To answer that question, necessarily requires an analysis of the nature and purpose of the specific spelling skill being tested by the LAST. Indeed, this Court's decision in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) requires that such a fundamental alteration analysis be conducted.

Neither lower court decision, however, conducted a fundamental alteration analysis of the spelling skill being tested or the underlying purpose of the skill

being tested. The District Court simply held that since spelling is measured, it is fundamental as a matter of law and a spelling aid need not be provided on the ground that such an accommodation would waive measurement of that "fundamental" skill. (Petition Appendix ("Pet. App.") at 24-25.) The Second Circuit affirmed on the same grounds. (Pet. App. at 4.)

These lower court decisions directly conflict with *PGA Tours* because that decision requires a fundamental alteration analysis, which in the context of this case must consider the following factors:

- the exact spelling skill that the essay part of the LAST purports to measure and that skills' scoring value on the test
- whether the LAST measures a person's ability to orally spell, as in the skill measured by a spelling bee
- whether the LAST measures one's ability to prepare a final written product or whether the test also measures the means whereby that written product is prepared, such that an external spelling aid would be inappropriate
- the underlying purpose of the spelling skill actually being tested
- whether the spelling skill that NES claims to be testing is fundamental to the LAST, in light of the fact that a spell checker was an authorized accommodation for the LAST when the test

was first created and for the first two years of its administration

- whether the spelling skill that NES claims to be testing is fundamental, in light of the fact that a spell checker is a standard accommodation for teacher certification tests throughout the rest of the country

Rather than conducting the required analysis, both lower courts *sub silentio* embraced the view of the law expressed by the dissent in *PGA Tours*. The dissent opined that the lower courts need not engage in a fundamental alteration analysis on a case-by-case basis and that the providers of public accommodations ought to be able to establish their own set of rules and procedures, free of any constraints that may arise under the ADA from accommodation requests by persons with disabilities.

In its opposition, NES pays lip service to *PGA Tours* but that is all. Nowhere in its Brief, does NES explain the nature or value of the spelling skill it purports to measure or how a spelling aid would fundamentally interfere with an evaluation of the test-taker's ability to prepare a final written product. Instead, NES argues by tautology: "Petitioner's competency at spelling cannot be tested with requiring her to actually spell"; "to permit outside assistance with spelling on the examination (either through a mechanical spelling aid or a human spelling assistant) would obviously interfere with the scoring of the LAST"; and "[a] modification in the

scoring of an exam is, by its very nature, a modification which 'fundamentally alters the measurement of the skills or knowledge the examination is intended to test.'" (NES Brief at 6, 8 & 10, respectively.)

The Petition should be granted because standardized tests for employment, certification, and educational purposes are used extensively throughout the Nation and this case presents an opportunity for this Court to re-affirm that *PGA Tour*'s fundamental alteration analysis is the law and that it applies to this important aspect of our society.

II. THE PETITION DOES NOT MISSTATE THE RECORD

NES claims that the Petitioner "egregiously misstates" the Record in four particular subject matters or facts. (NES Brief at 5-8.) We briefly respond as follows:

1. The Accommodations Granted Petitioner. NES argues that Petitioner has distorted the record about the accommodations given to Petitioner, suggesting that Petitioner was given all the accommodations that she requested. It states that "Petitioner was granted every reasonable accommodation she requested." (NES Brief at 5.)

Quite obviously, the key to this argument is the word "reasonable." To give an *un*reasonable accommodation or to require that a reasonable accommodation be performed under *unreasonable* conditions can

certainly be tantamount to no accommodation at all, depending on the circumstances.

Here, Petitioner requested over an 18 month period a series of accommodations, including an oral examination, a dictionary and a transcriber. (Pet. App. at 16-19.) After she was terminated from her position as a public school teacher, NES ultimately agreed to provide Petitioner with a transcriber but also required that as she dictated her essay she also had to dictate spelling, capitalization, paragraphing and punctuation. (Pet. App. at 18-19.) As we noted in the Petition (Petition at p. 5, fn.*), that is an impossible task, particularly for a dyslexic, and accordingly the transcriber "accommodation" offered by NES was illusory. The record fully supports these facts.[1]

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[1] Petitioner testified that after being offered the transcriber, NES told her that she would have to dictate her essay and at the same time, dictate spelling and grammar: "She [Elise Stromgren of NES] told me that I would have to spell every single word that I needed to – that I used out of my mouth up in the air. . . . I would have to spell it out . . . punctuate everything up in the air. . . . And then I said, well, I don't I – I can't do that. And then she said, well, maybe you shouldn't be teaching." (Falchenberg Deposition Transcript at pp. 371:23-372:24, reprinted in the Joint Appendix submitted to the Second Circuit (hereinafter cited "JA") at 760-61.)

NES's expert during the litigation before the District Court, who also reviewed Petitioner's accommodation requests at the time of her requests, testified as follows:

> Q. All right. Am I correct that to require somebody with dyslexia to dictate an essay, and at the

(Continued on following page)

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same time, to dictate spelling, capitalization, and punctuation would be a very difficult task?

Ms. Rodriguez: Objection.

A. It could be a difficult task.

Q. Could it be the kind of task that somebody with dyslexia would be unable to perform because it taxes too many cognitive functions?

A. It could be.

Q. Why it that?

Ms. Rodriguez: Objection.

A. Simply because of the complexity of doing all those things at the same time.

(JA 893-94.)

Petitioner's expert, Dr. Amy Margolis, submitted an expert's report, which stated in relevant part:

> I understand that NES has required Ms. Falchenberg to indicate orally spelling, paragraphing, punctuation, and capitalization for every word that a scribe would write for the essay portion of the LAST. This is not an appropriate accommodation for her disability because it is not an appropriate means for measuring her knowledge. More important, this proposed method of requiring a dyslexic person to perform oral spelling, punctuation, capitalization and paragraphing would deactivate short-term memory and cause tremendous cognitive interference, thereby inhibiting a person's ability to demonstrate their knowledge.

(JA 961-62.)

Since NES claims that Petitioner has made several "egregious" misstatements or mischaracterizations of the record, we have set forth in footnotes to this section of the Reply Brief direct quotes from the record with citations to the Joint Appendix submitted to the Second Circuit. We understand that the Joint Appendix can also be made available to the Court and urge the Court to request it, in the event that there are any concerns about Petitioner's characterizations of the record.

2. The Request for a Spell Checker. NES claims that Petitioner misrepresents the nature of her accommodation requests because Petitioner never specifically requested a spell checker. (NES Brief at 6.) It is correct that Petitioner never specifically requested the use of a spell checker. Instead, she requested an oral examination, a reader and a transcriber, and a dictionary. (*See* Pet. App. at 16-18.)

However, a transcriber or a dictionary is, in the context of this case, a kind of external spelling aid, and a spell checker is simply another kind of spelling aid that is functionally equivalent to a transcriber or a dictionary. Indeed, NES argues that the use of *any* of these spelling aids for the LAST would constitute a fundamental alteration of the LAST. (NES Brief at 11.) Moreover, NES had a duty to engage in a dialogue with Petitioner about her requests and to make appropriate suggestions to Petitioner of possible accommodations as part of the good-faith interactive process required by the ADA.[2] Thus, that Petitioner did not make a specific request for a spell checker as opposed to a transcriber or a dictionary does not change the substantive analysis of whether the use of

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[2] *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 407 (2002) (Stevens, J., concurring); *see also* 28 C.F.R. § 36.309(b)(3), *reprinted in* Pet. App. at 39 (private testing company must provide appropriate auxiliary aids unless it can show that the aid would fundamentally alter the test); *see generally* 29 C.F.R. § 1630.2(o)(3) and EEOC Appendix Section 1630.9 (in the employment context, both parties must engage in a problem-solving dialogue).

an external spelling aid would constitute a fundamental alteration of the LAST.

3. The Prior Permitted Use of a Spell Checker. NES claims that "there is no evidence in the record establishing that a spellchecker, or any other spelling aid, has ever been permitted on the LAST." (NES Brief at 6-7.) NES is simply wrong.

During discovery NES produced a document entitled "New York Teacher Certification Examination – Process for Handling Accommodations for Examinees with Special Needs." That document specifically states:

> Accommodations that require substantial alteration in standard testing conditions, procedures, and/or materials may include:
>
> • mechanical aids provided by the examinee (e.g., Franklin Speller, talking calculator). . . .[3]

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[3] JA at 976. This document was produced by NES pursuant to an order by the District Court, directing NES to produce the accommodation guidelines for the LAST in effect from 1991 through 1996. *Id.* at 975-76. In its letter transmitting the guidelines, NES's counsel confirmed compliance with the order by stating: "Enclosed is a copy (Bates Nos. NES 1233-39) of the January 1994 version of the guidelines governing test accommodations for the LAST. Please note that no earlier versions of the guidelines have been located to date, since the NYSTCE tests were not officially administered prior to the Fall of 1993." (JA at 972.) Thus, the record shows that the Franklin spell checker was specifically authorized for the LAST for the two year period from January 1994 through the end of 1995.

Thus, the record supports the facts regarding the prior permitted use of a spell checker for the LAST, a fact that undercuts – fatally – NES's claim that an external spelling aid would fundamentally alter the LAST.

4. The Other States' Permitted Use of Spell Checkers. NES claims that "there is no competent evidence in the record that *every* other state in the country permits the use of a spellchecker on all teacher-certification examinations." (NES Brief at 7; emphasis in original.) Again, NES is wrong – the record shows that in all States, except for New York, a spell checker is a permitted accommodation for teacher certification tests.[4] As noted in the Petition,

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[4] During discovery, Petitioner took the deposition of Educational Testing Services ("ETS"). That nation-wide testing company provides teacher certification tests known as the Praxis Series for 37 States (JA 1013), and during that deposition, ETS's witness testified that "The ETS spell checker has been approved for the constructed response and/or essay portions of the following tests: the GRE-Graduate Record Examinations, GRS-GRE Subject Test, GMAT-Graduate Management Admissions Test, the Praxis Series Examinations, and the Test of English as a Foreign Language (TOEFL)." (JA at 998).

At its deposition, NES's witness testified that NES permits the use of a spell checker for its teacher certification tests outside of New York State (JA 866), and in response to a discovery order by the District Court, NES stated that in 12 other States a spell checker is a permitted accommodation for the teacher certification tests in those States administered by NES. (JA 971). Thus, 49 States permit the use of a spell checker for their teacher certification tests and New York is the only State that prohibits its use on teacher certification tests.

New York State's isolated and extreme position on the use of an external spelling aid for persons with disabilities highlights an additional reason for granting the Petition – the need for the courts to enforce the ADA's sweeping mandate to make uniform the laws governing disability discrimination.

CONCLUSION

The Petition should be granted and the case set for plenary review.

Respectfully submitted,

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